1992

Clarence W. Denny v. Beaver Creek Coal, Cigna Insurance Co., the Employers' reinsurance Fund, and the Industrial commission of Utah : Brief of Petitioner

Utah Court of Appeals

BRIEF

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UTAH COURT OF APPEALS

CLARENCE W. DENNY, Petitioner, vs. BEAVER CREEK COAL, CIGNA INSURANCE CO., the EMPLOYERS' REINSURANCE FUND, and the INDUSTRIAL COMMISSION OF UTAH, Respondents.	:	Case No. 920568-CA Priority No. 7

BRIEF OF PETITIONER

PETITION FOR REVIEW OF

DENIAL OF PETITIONER'S MOTION FOR REVIEW OF

ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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This is a Petition for Review of the Industrial Commission's August 10, 1992 Order Denying Petitioner's Motion for Review alleging entitlement to workers' compensation benefits sustained as a result of an industrial accident. A Petition for Review of that Order was timely filed with this Court on September 1, 1992.

This Court has jurisdiction to hear this Petition for Review pursuant to Utah Code Annotated, Sections 35-1-82.53(2) (1988), 35-1-86 (1988), 63-46b-16 (1988), and 78-2a-3(2)(a) (1988); and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUE(S)/STANDARD OF APPELLATE REVIEW

There are three substantial issues presented for review:

(1) whether Mr. Denny's permanent total disability status was casually related to his 1983 industrial accident;

(2) whether the Industrial Commission committed error in finding that the Petitioner had failed to satisfy certain statute of limitations; and,

(3) whether the Industrial Commission and the Administrative Law Judge abused their discretion in not referring this matter to a medical panel to assist in the resolution of the medical causation issues.

The standard of appellate review which is to be applied to the resolution of the above issues is one involving "correction of error", since they involve questions of law, and no deference to the agency's view of the law is required. Utah Administrative

Procedures Act, Utah Code Annotated, Section 63-46b-16(4) (d) (1988). Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah 1991). Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984). McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

DETERMINATIVE STATUTE(S)/RULE(S)

Utah Code Annotated, Section 35-1-66 (1983), Section 35-1-67 (1983), Section 35-1-77 (1982) and Section 35-1-99 (1981) are the determinative statutes in this case. Rule R568-1-9 of the Industrial Commission's administrative rules is also applicable. They are set forth in full in the Addendum as Exhibit A.

STATEMENT OF THE CASE

Nature of the Case

Mr. Denny seeks review of the Industrial Commission's Order denying his Motion for Review wherein he alleged entitlement to workers' compensation benefits occasioned by his industrial accident.

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May 19, 1993

Ms. Mary T. Noonan, Chief Clerk
Utah Court of Appeals
230 South 500 East #400
Salt Lake City, Utah 84102

RE: Clarence W. Denny v. Beaver Creek Coal
Case No.: 920568-CA

Dear Ms. Noonan:

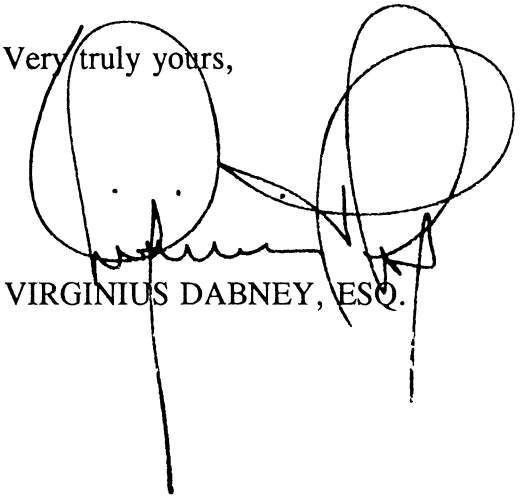
Pursuant to Rule 24 (j) of the Utah Rules of Appellate Procedure, please accept this letter as citation to supplemental pertinent and significant authorities which came to Petitioner's attention after the Briefs had been filed with the Court in the above-referenced case.

Specifically, during oral argument, reference was made to the necessity for Medical Panel referral based upon the parties' joint request that such referral be had which was denied by both the Administrative Law Judge and the Industrial Commission. I am enclosing a copy of an Industrial Commission Order of Remand in the case of Tallerico v. Kaiser Steel Corp., Case No. 91000569 (March 31, 1993) which resulted in the reversal by the Industrial Commission of an Administrative Law Judge's refusal to order a Medical Panel. Specifically, the Industrial Commission stated that "In the interest of fairness, we will order a Medical Panel because the issue [of medical causation] is at least uncertain." Pages 3-4. A similar Remand should be granted in this case for the same reason.

Enclosed you will find seven copies of this letter as required by Rule 24 (j), including copies of the Tallerico decision. I would appreciate it if you would see that copies are distributed to those members of the Panel who heard the oral argument on Monday, March 17, 1993.

If you have any questions, please let me know.

Very truly yours,



VIRGINIUS DABNEY, ESQ.

VD:rl
Enclosure
cc: Benjamin A. Sims, Esq.
Erie V. Boorman, Esq.
Steven J. Aeschbacher, Esq.
Mr. Clarence W. Denny
File
c:\files\denny\noonan.l1

THE INDUSTRIAL COMMISSION OF UTAH

Nick Tallerico, Applicant, vs. Kaiser Steel Corporation, Uninsured Employers Fund, and/or Employers' Reinsurance Fund, Respondents.	*	ORDER OF REMAND Case No. 91000569

The Industrial Commission of Utah (Commission) issues this order pursuant to Utah Code Annotated, Section 35-1-78 and Section 63-46b-12.

The 81 year old applicant originally filed an application for a hearing in this case on July 1, 1986 claiming permanent total disability based on a 1967 low back industrial accident, but no hearing was held due to lack of supporting medical evidence. He filed a new application on May 23, 1991 which resulted in a hearing on October 17, 1991. At the hearing, 115 pages of medical records and other documents were identified and admitted into evidence.

The applicant timely filed this motion for review of the order of the administrative law judge (ALJ) in the above referenced matter dated November 30, 1992. The order of the ALJ was issued after a period of 13 months from the date of the hearing, and denied the applicant's claim for permanent total disability benefits.

I. DID THE ALJ ERR BY FAILING TO CONSTRUE THE WORKERS' COMPENSATION STATUTE LIBERALLY IN FAVOR OF THE APPLICANT?

The applicant claims that the ALJ erred by failing to construe the workers' compensation act liberally in favor of awarding him benefits. He asserts that a long history of Utah workers' compensation case law supports his view that any doubts raised from the evidence are to be resolved in favor of the claim. The respondent notes that the Utah courts have required liberal construction of the workers' compensation statute and resolution of doubts in favor of the applicant in situations where the evidence on both sides is equally probative. However, there is no requirement that an applicant be awarded benefits when he has failed to present evidence to show the requisite causal connection between his disabling condition and his industrial accident. Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988).

The cases cited by the applicant in support of his motion for review relate to the general principles behind the proper construction of the workers' compensation statute. The Utah

Supreme Court has noted that "the right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of and in the course of employment." Chandler v. Industrial Commission, 184 P. 1020, 1021 (Utah 1919). Nothing in the analysis of the purposes of the workers' compensation act presented in Chandler supports the notion that an employee who cannot establish a causal connection between his disability and his employment is entitled to benefits.

The applicant has failed to establish by a preponderance of the evidence that his 1967 back injury caused his permanent and total disability. Thus, the applicant has failed to meet his burden of proof and is not entitled to permanent total disability benefits for his 1967 industrial accident.

II. IS THE ALJ'S DECISION AND ORDER SUPPORTED BY ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW?

The applicant asserts that the ALJ's Order fails to delineate adequate findings of fact and conclusions of law. Review of the ALJ's Order in light of Adams v. Board of Review, 173 Utah Adv. Rep. 18 (1991), indicates that the ALJ made findings sufficient to "disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached." Milne Truck Lines, Inc. v. Public Service Comm'n, 720 P.2d 1336, 1338 (Utah 1979) cited in Adams, at 20. The ALJ's findings of fact and conclusions of law are sufficient to show what issues were decided, the legal interpretations and applications made, as well as the subsidiary factual findings which support his decision. See Adams at 21.

The ALJ's findings are supported by the record and are detailed enough that we can follow his reasoning. The ALJ found that there was an industrial accident on October 3, 1967 for which only medical benefits were paid. He found that the applicant returned to work and continued to work through May 28, 1970. The ALJ noted that the medical records generated at the time indicated that the treatment of the applicant's back was related to a degenerative back condition, not the industrial accident. However, our reading of the records shows that the records do not reflect the reasons for the degenerative condition in the lumbar spine, or that such condition was present in 1967. Degenerative conditions may result from trauma as well as the normal aging processes.

Lastly, the ALJ noted that the medical records in the record do not show a causal connection between the applicant's 1967 industrial injury and his back problems even though the Social Security Administration paid him disability benefits from 1970 to 1975 due to his low back problems. We agree that there was insufficient evidence presented to the ALJ to show that the

applicant's low back problems were work related. (Order, November 30, 1992).

III. DID THE ALJ ERR BY FAILING TO REFER THIS MATTER TO A MEDICAL PANEL?

The applicant complains that the ALJ failed to convene a medical panel. There was no conflicting medical evidence in the record to bring into question the issue of medical causation. A reading of the evidence in the record leads one to the preliminary conclusion the applicant's back problems are probably due to severe degenerative conditions. However, we, like the ALJ, cannot decide that the applicant's back problems were caused by the 1967 injury. We conclude that the evidence in this regard is uncertain, and thus requires referral to a medical panel. We will discuss this issue later.

The medical records exhibit (Applicant's Exhibit #1) shows that in 1967, the applicant reported that he had previous trouble with his back in 1952 (Exhibit #1B). Dr. Milligan noted in June of 1970 that the applicant was complaining of pain in his low back radiating down his legs and pain at the base of his neck (Exhibit #1F). Dr. Milligan diagnosed extensive degenerative changes in the applicant's back at that time and opined that his 50% impairment was "due to far advanced degenerative changes." Id. However, there is nothing to show a medical reason for the degeneration. In this regard, the records of Carbon Medical Service Associates also diagnose "severe degeneration of [the] lumbar spine." Exhibit #1G. X-rays obtained in 1985 show degenerative disease with little change from the 1980 films. Exhibit #1J.

The applicant submitted a report prepared by Dr. Hess in support of his motion for review. Dr. Hess examined the applicant and reviewed his medical records in February 1992, some 25 years after the accident and several months after the hearing. Since Dr. Hess' report was not a part of the record below, we cannot now use that later submitted report to support a finding of medically conflicting evidence to support referral to a medical panel.

The referral of a disability claim to a medical panel is within the discretion of the commission pursuant to U.C.A. 35-1-77 and Utah Administrative Code R568-1-9 (1992). However, that discretion is not unbounded. The controlling statute provides for permissive referral. Hone v. J.F. Shea Co., 728 P.2d 1008, 1012 (Utah 1986). In some cases, such as where the evidence of causal connection between the work-related event and the injury is uncertain or highly technical, failure to refer the case to a medical panel may be an abuse of discretion. Champion Home Builders v. Industrial Comm'n, 703 P.2d 306, 308 (Utah 1985). In the interest of fairness, we will order a medical panel because the

issue is at least uncertain.

There is no question that the applicant injured his back in 1967, and that he was given a 100 percent disability by the Social Security Administration for a back condition. Since there is no requirement that a Social Security disability be work related, we must have more information on which to base a decision. The records show that at present the applicant shows degenerative changes. We are not sure that these changes are totally due to age, and it will require medical personnel to tell us to what extent the degeneration may be due to age or to trauma from an industrially caused injury. There is thus a question about medical causation with regard to the industrial accident and current low back problems, and for this reason we feel compelled to order a medical panel.

IV. DID THE ALJ PROPERLY DETERMINE THE ISSUE OF THE APPLICANT'S CREDIBILITY?

The applicant asserts that the ALJ improperly found that the applicant and his wife lacked credibility. The applicant further asserts that the issue in this case is medical causation and that the applicant's credibility or lack thereof, is irrelevant to the disposition of that issue. The Commission sees the primary issue to be determined in this case is medical causation, and that the applicant's credibility may have little to do with the outcome in this case. The fact of an industrial accident in 1967 has been established. The unanswered question is whether there is a medical causation connection to the applicant's current low back problems. Generally, medical evidence will establish the medical component.

ORDER:

IT IS ORDERED that the Order of the administrative law judge dated November 30, 1992 is hereby remanded for referral to a

medical panel within 45 days.

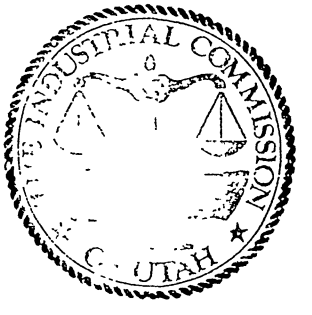
Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Colleen S. Colton
Commissioner

Certified this 31st day of March 1993.
ATTEST:

Patricia O. Ashby (RRB)
Patricia O. Ashby
Commission Secretary



Course of Proceedings

Mr. Denny filed an application for permanent, total disability compensation benefits sustained as the result of an industrial injury which occurred in March/April 1983. (R. at 1, 11). None of the parties disputed that Mr. Denny is disabled (R. at 52-53); however, Respondents alleged that Mr. Denny failed to prove legal and medical causation and is thus not entitled to permanent, total disability benefits. (R. at 23-24). A formal hearing was held before an Administrative Law Judge on December 4, 1990. (R. at 27).

Disposition Below

On March 26, 1992 the Administrative Law Judge held that Mr. Denny and his witnesses were not credible, even though no contrary witnesses were called to refute their testimony, and that Mr. Denny had failed to demonstrate that his symptoms and disability after March/April 1983 were the result of pre-existing conditions without any contribution from the work activities of March/April 1983. A Medical Panel was not appointed to examine Mr. Denny or review his medical records. His claim for permanent, total disability benefits was dismissed with prejudice for failure to establish legal and medical causation. (R. at 51-66, copy attached to Addendum as Exhibit B).

Mr. Denny filed a Motion for Review with the Industrial Commission on April 24, 1992. (R. at 67-70). The Industrial Commission reversed the finding that Mr. Denny and his witnesses were not credible and found that an industrial accident had occurred in March 1983; however, the Commission denied his Motion

for Review finding a lack of legal and medical causation as well as a failure to file a claim for compensation within the statute of limitations imposed by Utah Code Annotated, Section 35-1-99 (1981). (R. at 104-116, copy attached to Addendum as Exhibit C). He challenges that final agency action in this Petition for Review.

Statement of the Facts

In March/April 1983, Mr. Denny was employed by Beaver Creek Coal Co. as a general laborer. (R. at 53). On the date in question, he was driving a trailer, pulling a 1,100 gallon water tank, accompanied by a co-worker, Mr. Matt Breniman. His job assignment on that date was to water the roadways on the belt line to reduce dust. (R. at 53). On this particular occasion, Mr. Denny backed up the trailer to reach the lower belt line. As he backed over the fault line, the tilt and rush of water to the rear of the trailer pulled the entire trailer back down and under the belt line. (R. at 53).

Mr. Denny's hard hat was knocked off and the lower roller of the belt line pushed him down and pinned his body between his legs. (R. at 53). Mr. Breniman was knocked off the vehicle by a cable holding up the belt line. When he came and offered assistance to the Mr. Denny, he found Mr. Denny pinned over the steering wheel by a cable across the mid-section of his back. He did not recall the exact date of the accident but fixed it in the general vicinity of early 1983. He also recalled that Mr. Denny crawled out of the trailer himself. (R. at 104). Mr. Denny testified that his back hurt from his head to his belt line and his shoulder was severely

scratched. (R. at 104).

While Mr. Denny and Mr. Breniman were discussing the accident, Mr. John Alger, the belt-line supervisor, came upon them and was told about the accident, and the three men then went to the office to fill out an accident report. They did so and Mr. Denny signed it. He did not know what happened to the report after that. (R. at 105).

The accident was discussed by the supervisors at a safety meeting with the mine employees the next day. Mr. Alger also testified that he had made a written report of the accident, although one could not now be found in the company records. (R. at 105).

In addition, the accident occurred at the end of Mr. Denny's shift for the day. He returned to work the next day, still feeling sore. Within 6 months, he began to get pain down his left neck, shoulder and arm, but merely endured it and continued to work. (R. at 105).

In the winter of 1986, Mr. Denny finally sought medical treatment and was refereed to Dr. Kirkpatrick in Provo, Utah who performed a neck fusion on him on March 13, 1987. (R. at 204-205). In October 1987, the employer told Mr. Denny not to come back to work. He did not receive a blue slip or file an unemployment claim. (R. at 55).

A lower back operation also was required, subsequently and it was performed in January 1988, by Dr. Kirkpatrick. (R. at 177-179). Mr. Denny received short term disability for 13 weeks and

then long term disability until he began receiving Social Security Disability payments. (R. at 57).

There was some evidence that in 1976, Mr. Denny suffered a hairline fracture of his left shoulder blade when a rock fell on it, while he was working at the Soldier Creek Mine. Mr. Denny was off work for six months on that occasion, but no surgery was performed. (R. at 105). Mr. Denny denied having substantial neck or back pain or problems until the March/April 1983 industrial accident. (R. at 105).

SUMMARY OF ARGUMENT(S)

Mr. Denny sustained a compensable industrial injury in March/April 1983 while in the employ of Beaver Creek Coal Co. The Doctors who examined and treated Mr. Denny found that he had sustained an industrial injury and that it was responsible, at least in part, for his resulting permanent total disability status.

Respondents did not have their own consultative medical examination of Mr. Denny performed nor did they offer any conflicting lay or medical testimony or documentation. Although the issue of medical causation was raised by the Respondents, the Administrative Law Judge did not refer this matter to a Medical Panel.

Mr. Denny was not required to file a claim for compensation with the Industrial Commission within three years of the accident because he had not at that point incurred any disability. The three-year statute of limitations is a statute of repose because it

improperly required Mr. Denny to file a claim for disability benefits before he became disabled, and hence, is unconstitutional as violative of the Open Courts provision of the Utah Constitution.

This Court should summarily reverse the Industrial Commission's determination that Petitioner did not establish legal or medical causation and remand with instructions to enter an award establishing that fact. In the alternative, this matter should be remanded with instructions to the Industrial Commission to convene a Medical Panel to examine the medical causation issue.

ARGUMENT

I

THE WORKERS' COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS ARE TO BE RESOLVED IN FAVOR OF THE INJURED WORKER.

Few principles of workers' compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); State Tax Commission v. Industrial Commission, supra.; J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, supra.; Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v.

Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra at 1021-1022, discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

> We are also reminded that our statute requires that the statues of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'
>
> * * * * * *
>
> In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. (Emphasis added.)

The Administrative Law Judge in rendering his Findings of Fact

and Conclusions of Law failed to apply this vital rule of construction. Nowhere in his Findings or Conclusions is there any evidence of a "liberal construction" or the "resolution of doubt in favor of the claim". Rather, the Administrative Law Judge whenever any doubt or uncertainty appeared in the record, construed it against the injured employee, often finding an issue of credibility were none actually existed.

It is to the credit of the employer and insurance carrier that in their response to Mr. Denny's Motion for Review, they conceded that credibility "was totally irrelevant to the resolution of the claim". (R. at 89). They further joined in asking the Industrial Commission to refer this matter to a Medical Panel. (R. at 94). It is also to the Respondent Industrial Commission's credit that the credibility question was reversed by it on review.

Nevertheless, the "humane and beneficent purposes" of the Act must be kept in mind in reviewing the final Order of the Industrial Commission, generally, and should have been applied further by the Industrial Commission when it reviewed the remaining issues in Mr. Denny's claim.

II

THE PETITIONER'S PERMANENT TOTAL DISABILITY STATUS IS CAUSALLY RELATED TO HIS 1983 INDUSTRIAL ACCIDENT.

The evidence that Mr. Denny suffered an industrial injury in 1983 was overwhelming and largely unrefuted other than by innuendo. The Industrial Commission made a specific finding that there was an industrial accident in 1983, but based their argument that a

compensable injury did not occur on that date because Mr. Denny walked 3/5's of a mile after the accident, returned to work the next day and did not seek significant medical attention for several years thereafter. This argument begs the question and fails to apply clearly delineated standards as to what constitutes a "compensable injury." There is no requirement in Utah law that an industrial accident result in immediate and debilitating injury in order for it to be "compensable."

In order to establish that he has suffered a compensable injury under the Workers' Compensation Act, Mr. Denny need only show that the injury must have occurred by accident; and there must be a causal connection between the injury and the claimant's employment activities. Sisco Hilte v. Industrial Commission, 766 P.2d 1089, 190 (Utah App. 1988).

In the landmark case of Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), the Supreme Court defined what constitutes an accident under Workers' Compensation Act. The Court held as follows:

> For purposes of worker's compensation, the key requirement of an 'accident' is that the occurrence be unanticipated, unplanned and unintended; where either cause of injury or result of exertion is different from what would normally be expected to occur, occurrence is unplanned, unforeseen, and unintended and, thus, by 'accident'. Id. at 21.

Mr. Denny testified that he suffered an industrial accident when he injured himself and the Industrial Commission has ruled that "there is now no issue as to memory, truthfulness, ability to observe, or bias among others...." (R. at 108). Petitioner's

version of the events was supported by co-workers and was never rebutted by contrary testimonial or documentary evidence. As such, the evidence is overwhelming that in 1983, Mr. Denny suffered an industrial accident and the only dispute raised is whether it is "compensable."

First, Mr. Denny does not deny that he had pre-existing back injuries; however, just because a person suffers a pre-existing condition, he or she is not disqualified from obtaining compensation. "Compensation is not dependant on the state of an employee's health or his freedom from constitutional weakness or latent tendency." Denver v. Hansen, 650 P.2d 1319, 1321 (Colo. App., 1982). The clear law of this state is that "the aggravation or lighting up of a preexisting disease by an industrial accident is compensable...." Powers v. Industrial Commission, 427 P.2d 740, 743 (Utah 1967) (quoted with approval in Allen, id.).

Second, there was no medical evidence offered at the hearing which suggested that Mr. Denny's injuries were not at least partially the result of the industrial accident. In fact, Dr. Kirkpatrick after determining that Mr. Denny had a 45% permanent, partial impairment stated that his disability "is at least partially related to his industrial accident". (R. at 149). No conflicting medical evidence exists in the record to refute that conclusion. The Industrial Commission cannot summarily ignore or arbitrarily discount competent, uncontradicted evidence without some rational basis for doing so. Kaiser Steel Corp. v. Industrial Commission., 709 P.2d 1168 (Utah 1985). Frito-Lay, Inc. v. Jacobs,

689 P.2d 1335 (Utah 1984).

Third, even the Respondent employer and insurance carrier joined in arguing that the matter should be referred to a medical panel, but the Administrative Law Judge and the Commission summarily refused to do so. Such summary conclusions do not constitute proper fact-finding. In the recent case of Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991), the Court stated as follows:

> While the purported 'Findings of Fact' written by the A.L.J. contain an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact. In order for a finding to truly constitute a 'finding of fact,' it must indicate what the A.L.J. determines in fact occurred.... The evidence did not merely indicate two possible versions of a fact whereby we could conclude that the denial of benefits necessarily indicates that the Commission accepted one version over another. The evidence shows several possible configurations and degrees of injury and/or disease, if any, and the causes, if any, thereby creating a matrix of possible factual findings. A mere summary of the conflicting evidence in this case therefore does not give a clear indication of the A.L.J.'s or the Commission's view as to what in fact occurred. Since we cannot even determine why the Commission found there was no causation shown, we clearly cannot assume that the Commission actually made any of the possible subsidiary findings. The findings are therefore inadequate. Id. at 20.

Although none of the parties dispute that Mr. Denny is permanently and totally disabled, neither the Administrative Law Judge nor the Industrial Commission explain how they reached that decision. Significantly, even the employer and its insurance carrier agreed that "The Decision and Order are not truly supported by adequate findings based on the entire record". (R. at 90).

The Industrial Commission's as well as the Administrative Law

Judge's purported Findings of Fact, Conclusions of Law and Order should at a minimum be vacated and remanded with instructions to enter a new Order with detailed and subsidiary facts to disclose the steps by which the ultimate conclusion was reached. Failure to do so, denies Petitioner the ability to marshal the evidence in support of the findings and show that it is not substantial. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-68 (Utah App. 1989).

III

THE INDUSTRIAL COMMISSION COMMITTED ERROR IN FINDING THAT THE PETITIONER HAD FAILED TO SATISFY A THREE-YEAR STATUTE OF LIMITATION FOR FILING A CLAIM.

In 1983 Utah Code Annotated, Section 35-1-99 (1981) provided that an employee was required to give notice of his accident and injury to the employer within one year from the date of the accident, and file a claim for compensation within three years from the date of the accident. The statute provided that failure to give notice or file a claim within those time periods wholly barred the right to compensation.

The Industrial Commission in this case found that although Mr. Denny had satisfied the requirement for the giving of notice to his employer within one year, had failed to

> ... file a claim for compensation until some five and one/half years after his injury. This was outside the three year statue of limitations imposed for compensation claims by U.C.A. 35-1-99, and temporary total compensation, temporary partial compensation, and permanent partial compensation requested by the applicant for the 1983 injury must be denied under this statute. There is, however, no bar to medical expense claims under

this statute, and the issue of permanent total compensation remains open. (R. at 111).

Significantly, the Industrial Commission acknowledged that they had "jurisdiction" and that there was no statute of limitations for permanent total disability compensation. Since, as argued herein, Mr. Denny can establish, or at least a medical panel should be convened to establish, medical causation that his permanent, total disability status is in part the result of his 1983 industrial accident, he may at a minimum be entitled to permanent, total disability benefits.

The only issue remaining here is whether he is entitled to benefits for temporary total, temporary partial, and permanent partial compensation, in the event that his permanent, total disability claim is not established. The requirement, if there is one, allegedly contained in Utah Code Annotated, Section 35-1-99 (1981) that such claims must be filed within three years is a statute of repose and violates the Open Courts provisions of the Utah Constitution. See, e. g., Wrolstad v. Industrial Commission, 786 P.2d 243 (Utah 1990), and Velarde v. Industrial Commission, 831 P.2d 123 (Utah App. 1992)

The problem with the three year statue of repose is that it fails to take into account the cumulative and increasing nature of Mr. Denny's injuries which ultimately ripened into a valid claim for compensation more than three years after his industrial accident occurred. It is undisputed by the parties that following the accident, Mr. Denny continued to work for 4 and one/half years. Under the Industrial Commission's logic, since he did not file a

claim for compensation within three years, which was before his claim for compensation matured, it is now barred. This Court has declared such statutes of repose as unconstitutional. See Wrolstad, supra. and Velarde, supra.

In Wrolstad, supra, at 245, this Court acknowledged that "a person can't file an occupational disease claim for a disease he does not know he has." Likewise, Petitioner here could not file his claim within three years of the date of the accident as provided by the statute because he did not know then the extent or nature of his injuries. It is precisely that fact which makes the statute one of repose and not limitation.

Professor Larson cites the clear problems and fundamental unfairness that such a repose statute creates:

> The classic illustration is that of the apparently trivial accident that matures into a disabling injury after the claim period has expired. A workman is struck in the eye by a metal chip, but both he and the company doctors dismiss the accident as a petty one, and of course no claim is made, since there is no present injury or disability. Eighteen months later a cataract develops as the direct result of the accident. If the statute bars claims filed more than one year after the 'accident,' and if the court applies the statutory language with medieval literalism, the workman can never collect for the injury no matter how diligent he is: he cannot claim during the year because no compensable injury exists; he cannot claim after the year, because the statute runs from the accident. 2B Larson, Workmen's Compensation Law, Section 78.42(a), page 15-262 (1989).
>
> * * *
>
> Limitations periods are of course constitutional in general, but is such a period valid when it begins to run before a claim exists and assumes to destroy it before it is born? Is it not elementary that the running of the period must be related to the time of acquisition of the enforceable right, rather that of some event which may or may not coincide with that acquisition? Suppose a

> statute were passed which said than, in the event of any highway collision, suit must be commenced within two years of the last presidential election. This is in no way any sillier or more oppressive than a statute which says that a man who gets a bit of grime in his eye in 1960 which causes only slight irritation must bring a claim for blindness within one year of that time--blindness that does not develop until 1962. 2B Larson, Workmen's Compensation Law, Section 78.42(e), page 15-272.5 (1989).

Once medical causation is established (and we believe it has been so established by this record), Mr. Denny should be entitled to permanent, total disability compensation. In the event Mr. Denny's lifetime claim is not accepted, he still has a valid claim for temporary total, temporary partial and permanent partial benefits since the 3-year statute of limitations for the filing of a claim is an unconstitutional statute of repose.

IV

THE INDUSTRIAL COMMISSION AND ADMINISTRATIVE LAW JUDGE ABUSED THEIR DISCRETION IN NOT REFERRING THIS MATTER TO A MEDICAL PANEL TO ASSIST IN THE RESOLUTION OF THE MEDICAL CAUSATION ISSUES.

Utah Code Annotated, Section 35-1-77 (1982) reads as follows:

> Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and if the employer or its insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission....

There is no question that the employer and insurance carrier denied liability as provided in the statute. Despite the fact that there were significant medical issues involved and both Mr. Denny and the Employer and its Insurance Carrier requested that this matter be referred to a medical panel, the Industrial Commission in

its Order Denying Motion for Review stated:

> There is no basis on which to refer this case to a medical panel. We have been shown no conflicting medical reports, and the applicant has failed to carry his burden of persuasion. (R. at 113).

There is no dispute that this case involved "significant medical issues". The question concerning the contribution of the 1983 industrial accident to Mr. Denny's permanent, total disability status is the primary issue in this case. Utah Industrial Commission Rule R568-1-9 governing the "necessity of submitting a case to a medical panel" provided in relevant part:

> Pursuant to Section 35-1-77, U.C.A., the commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:
>
> A. A panel will be utilized by the Administrative Law Judge where:
>
> 1. One or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:
>
> (a) Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,
>
> (b) Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days, and/or
>
> (c) Medical expenses in controversy amounting to more than $2,000.... See Addendum, Exhibit A.

The Rule mandatorily requires that a panel "will" be used when "one or more significant medical issues may be involved". Although the Rule further provides that "Generally a significant medical issue must be shown by conflicting medical reports", the Rule only states that such is the case "generally" and not that such

conflicting reports are always required in order for there to be "significant medical issues".

There were no conflicting medical reports in this case simply because the Respondents chose not to present any. They did, however, join in requesting that this matter be referred to a medical panel. The need for a medical panel should not be avoided by a parties' failure or decision not to conduct their own consultative medical examination. In addition, in this case, Mr. Denny's own medical reports add some confusion to the issue because of Dr. Kirkpatrick's referral to a nonexistent 1987 industrial accident rather than the one in 1983. It is for these reasons that referral to a medical panel was necessary and the failure to do so was more than an abuse of discretion - it was plain error. See Lipman v. Industrial Commission, supra and Schmidt v. Industrial Commission, 617 P.2d 693 (Utah 1980) interpreting the former Utah Code Annotated, Section 35-1-77 (1953) which made referrals to medical panels mandatory in cases of denied liability.

Although reference to a medical panel under Utah Code Annotated, Section 35-1-77 (1982) is discretionary, that discretion is not unrestricted and has been made mandatory by the Commission's own Rules and Regulations (Utah Admin. Code R568-1-9). The failure to refer a matter to a Medical Panel when such referral is requested by all parties and is necessary to resolve medical causation issues is plain error. "In some cases, such as where the evidence of causal connection between the work-related event and the injury is uncertain or highly technical, failure to refer the

case to a medical panel may be an abuse of discretion." Champion Home Builders v. Industrial Commission, 703 P.2d 306, 308 (Utah 1985). See also Hone v. J.F. Shea Co., 728 P.2d 1008 (Utah 1986).

In this case, the causal connection between the work-related injury and the Applicant's permanent, total disability, if not clear, was at least uncertain and failure to refer the matter to a medical panel was error. The Order Denying Motion for Review should at the least be reversed and the matter remanded with directions to refer the matter to a medical panel since failure to do was in direct conflict with Industrial Commission practice and rule. It was also contrary to all parties' positions.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

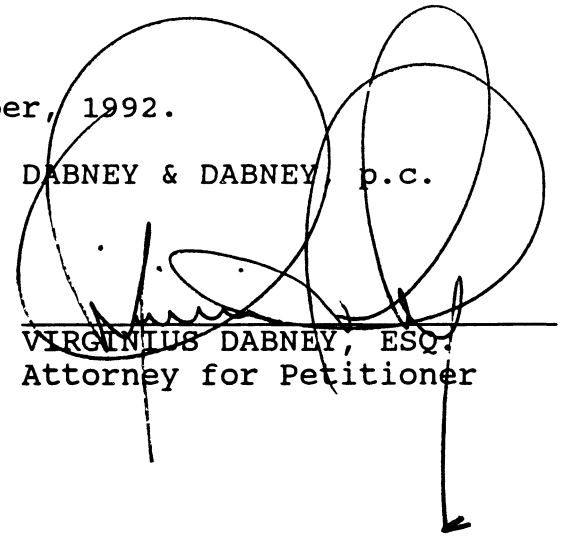
Based upon the foregoing it is respectfully submitted that the Industrial Commission erred when it entered its August 10, 1992 Order dismissing Mr. Denny's claim for permanent, total disability benefits for lack of legal and medical causation as well as the failure to file a claim for compensation within three years. The uncontroverted evidence submitted to the Industrial Commission supports the finding that he sustained a significant injury due to his 1983 industrial accident, and is permanently, totally disabled due to that injury. To the extent there is any doubt or confusion as to medical causation, it was error for the Administrative Law Judge and the Industrial Commission not to convene a medical panel.

Therefore, it is respectfully requested that this Court release the final agency action, and remand with instructions to

either award him benefits based on the uncontroverted facts and medical evidence presented, or in the alternative, to convene a medical panel.

DATED this 12th day of November, 1992.

DABNEY & DABNEY, p.c.



VIRGINIUS DABNEY, ESQ.
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PROOF OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Petitioner were mailed, postage prepaid, on this 12th day of November, 1992 to the following:

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ADDENDUM

EXHIBIT A: Utah Code Annotated, Section 35-1-66 (1983)
Utah Code Annotated, Section 35-1-67 (1983)
Utah Code Annotated, Section 35-1-77 (1982)
Utah Code Annotated, Section 35-1-99 (1981)
Utah Administrative Code R568-1-9.

EXHIBIT B: Findings of Fact, Conclusions of Law and Order (March 26, 1992).

EXHIBIT C: Order Denying Motion for Review (August 10, 1992).

35-1-66. Permanent partial disability — Scale of payments. The commission may make a permanent partial disability award at any time prior to eight years after the date of injury to an employee whose physical condition resulting from such injury is not finally healed and fixed eight years after the date of injury and who files an application for such purpose prior to the expiration of such eight-year period.

In no case shall the weekly payments continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be 66 ⅔% of that employee's average weekly wages at the time of the injury, but not more than a maximum of 66 ⅔% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but not to exceed 66 ⅔% of the state average weekly wage at the time of the injury per week, to be paid weekly for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation provided for temporary total disability and temporary partial disability, to wit:

For the loss of:	Number of Weeks
(A) Upper extremity	
(1) Arm	
(a) Arm and shoulder (forequarter amputation)	218
(b) Arm at shoulder joint, or above deltoid insertion	187
(c) Arm between deltoid insertion and elbow joint, at elbow joint, or below elbow joint proximal to insertion of biceps tendon	178
(d) Forearm below elbow joint distal to insertion of biceps tendon	168
(2) Hand	
(a) At wrist or midcarpal or midmetacarpal amputation	168
(b) All fingers except thumb at metacarpophalangeal joints	101
(3) Thumb	
(a) At metacarpophalangeal joint or with resection of carpometacarpal bone	67
(b) At interphalangeal joint	50
(4) Index finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	42
(b) At proximal interphalangeal joint	34
(c) At distal interphalangeal joint	18

For the loss of:	Number of Weeks
(5) Middle finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	34
(b) At proximal interphalangeal joint	27
(c) At distal interphalangeal joint	15
(6) Ring finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	17
(b) At proximal interphalangeal joint	13
(c) At distal interphalangeal joint	8
(7) Little finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	8
(b) At proximal interphalangeal joint	6
(c) At distal interphalangeal joint	4
(B) Lower extremity	
(1) Leg	
(a) Hemipelvectomy (leg, hip and pelvis)	156
(b) Leg at hip joint or three inches or less below tuberosity of ischium	125
(c) Leg above knee with functional stump, at knee joint or Gritti-Stokes amputation or below knee with short stump (three inches or less below intercondylar notch)	112
(d) Leg below knee with functional stump	88
(2) Foot	
(a) Foot at ankle	88
(b) Foot partial amputation (Chopart's)	66
(c) Foot midmetatarsal amputation	44

(3) Toes
(a) Great toe
(i) With resection of metatarsal bone 26
(ii) At metatarsophalangeal joint 16
(iii) At interphalangeal joint 12
(b) Lesser toe (2nd — 5th)
(i) With resection of metatarsal bone 4
(ii) At metatarsophalangeal joint 3
(iii) At proximal interphalangeal joint 2
(iv) At distal interphalangeal joint 1
(c) All toes at metatarsophalangeal joints 26
(4) Miscellaneous
(a) One eye by enucleation 120
(b) Total blindness of one eye 100
(c) Total loss of binaural hearing 100

(C) Permanent and complete loss of use shall be deemed equivalent to loss of the member. Partial loss or partial loss of use shall be a percentage of the complete loss or loss of use of the member. This paragraph, however, shall not apply to the items listed (B) (4).

Permanent hearing loss caused by accident shall be determined and paid as follows:

"Loss of hearing" is defined as the binaural hearing loss measured in decibels with frequencies of 500, 1000, ~~and~~ 2000, and 3000 cycles per second (cps) using pure tone air conduction audiometric instruments ~~(ASA 1951)~~ (ANSI 1969) approved by nationally recognized authorities in the field of measurement of hearing impairment. Reduction of hearing ability in frequencies above ~~2000~~ 3000 cycles per second shall not be considered in determining compensable disability. If the average decibel loss at 500, 1000, 2000, and 3000 cycles per second is 25 decibels or less, usually no hearing impairment exists.

"Presbycusis" is defined as hearing loss common to persons of advanced age and s considered to be due to general environment rather than industrial conditions.

In measuring hearing loss, a medical panel of medical and paramedical ~~professions~~ professionals appointed by the commission shall measure the loss in each ear at the ~~three~~ four frequencies 500, 1000, ~~and~~ 2000, and 3000 cycles per second which shall be added together and divided by ~~three~~ four to determine the average decibel loss. ~~To allow for presbycusis, there shall be deducted from the average decibel loss ½ a decibel for each year of the employee's age over forty at the time of the accident:~~ To determine the percentage of hearing loss in each ear, ~~(after deduction of the loss in decibels for presbycusis)~~ the average decibel loss for each decibel of loss exceeding ~~fifteen~~ 25 decibels shall be multiplied by 1 ½% up to the maximum of 100% which is reached at ~~82~~ 92 decibels.

Binaural hearing loss is determined by multiplying the percentage of hearing loss in the better ear by five, then adding the percentage of hearing loss in the poorer ear and dividing by six. The resulting figure is the percentage of binaural hearing loss. Compensation for permanent partial disability for binaural hearing loss shall be determined by multiplying the percentage of binaural hearing loss by 100 weeks of compensation benefits as provided in this chapter. Where an employee files one or more claims for hearing loss the percentage of hearing loss previously found to exist shall be deducted from any subsequent award by the commission. In no event shall compensation benefits be paid for total or 100% binaural hearing loss exceeding 100 weeks of compensation benefits.

For any other disfigurement or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion as near as may be to compensation for specific loss as set forth in the schedule in this section but not exceeding in any case 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function.

The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of 66 ⅔% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid.

35-1-67. Permanent total disability — Amount of payments — Vocational rehabilitation — Procedure and payments. In cases of permanent total disability the employee shall receive 66 ⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of ~~eighteen~~ 18 years, up to a maximum of four ~~such~~ dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week. However, in no case of permanent total disability shall the employer or its insurance carrier be required to pay ~~such~~ weekly compensation payments for more than 312 weeks; ~~and provided further, that~~ a. A finding by the commission of permanent total disability shall in all cases be tentative and not final until such time as the following proceedings have been had: ~~Where~~ If the employee has tentatively been found to be permanently and totally disabled, it shall be mandatory that the industrial commission of Utah refer ~~such~~ the employee to the division of vocational rehabilitation under the state board of education for rehabilitation training and it shall be the duty of the commission to order paid to ~~such~~ the vocational rehabilitation division, out of the second injury fund provided for by ~~section~~ subsection 35-1-68 (1), not to exceed $1,000 for use in the rehabilitation and training of ~~such~~ the employee; the rehabilitation and training of ~~such~~ the employee shall generally follow the practice applicable under section 35-1-69, ~~and~~ relating to the rehabilitation of employees having combined injuries. If ~~and when~~ the division of vocational rehabilitation under the state board of education certifies to the industrial commission of Utah ~~and~~ in writing that ~~such~~ the employee has fully co-operated with the division of vocational rehabilitation in its efforts to rehabilitate him, and in the opinion of the division the employee may not be rehabilitated, ~~then~~ the commission shall order that there be paid to ~~such~~ the employee weekly benefits at the rate of 66 ⅔% of his average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of ~~eighteen~~ 18 years, up to a maximum of four ~~such~~ dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week out of the second injury fund provided for by ~~section~~ subsection 35-1-68 (1), for such period of time beginning with the time that the payments, ~~(as in this section provided)~~, to be made by the employer or its insurance carrier terminate and ending with the death of the employee. No employee~~, however,~~ shall be entitled to any such benefits if he fails or refuses to co-operate with the division of vocational rehabilitation ~~as set forth herein~~ under this section.

All persons who are permanently and totally disabled and entitled to benefits from the second injury fund ~~designated in subsection (1) of section 35-1-68~~ under subsection 35-1-68 (1), including those injured prior to March 6, 1949, shall receive not less than ~~$100~~ $110 per week when paid only by the second injury fund, or when combined with compensation payments of the employer or the insurance carrier. The division of vocational rehabilitation shall, at the termination of the vocational training of the employee, certify to the industrial commission of Utah the work the employee is qualified to perform, and thereupon the commission shall, after notice to the employer and an opportunity to be heard, determine whether the employee has, notwithstanding such rehabilitation, sustained a loss of bodily function.

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, ~~shall constitute~~ constitutes total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability ~~shall be~~ is required in ~~such~~ those instances; ~~in~~. In all other cases~~, however, and~~ where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 35 1-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

35-1-77. Medical panel — Discretionary authority of commission to refer case — Findings and reports — Objections to report — Hearing — Expenses. Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission may refer the medical aspects of the case to a medical panel appointed by the commission and having the qualifications generally applicable to the medical panel set forth in section 35-2-56. The medical panel shall then make such study, take such X-rays and perform such tests, including post-mortem examinations where authorized by the commission, as it may determine and thereafter make a report in writing to the commission in a form prescribed by the commission, and also make such additional findings as the commission may require. The commission shall promptly distribute full copies of the report of the panel to the applicant, the employer and the insurance carrier by registered mail with return receipt requested. Within fifteen days after such report is deposited in the United States post office, the applicant, the employer or the insurance carrier may file with the commission objections in writing thereto. If no objections are so filed within such period, the report shall be deemed admitted in evidence and the commission may base its finding and decision on the report of the panel, but shall not be bound by such report if there is other substantial conflicting evidence in the case which supports a contrary finding by the commission. If objections to such report are filed the commission may set the case for hearing to determine the facts and issues involved, and at such hearing any party so desiring may request the commission to have the chairman of the medical panel present at the hearing for examination and cross-examination. For good cause shown the commission may order other members of the panel, with or without the chairman, to be present at the hearing for examination and cross-examination. Upon such hearing the written report of the panel may be received as an exhibit but shall not be considered as evidence in the case except as far as it is sustained by the testimony admitted. The expenses of such study and report by the medical panel and of their appearance before the commission shall be paid out of the fund provided for by section 35-1-68.

35-1-99. Notice of injury and claim for compensation — Limitation of action — Tolling period for filing claim. When an employee claiming to have suffered an injury in the service of his employer fails to give notice to his employer of the time and place where the accident and injury occurred, and of the nature of the same, within 48 hours, when possible, or fails to report for medical treatment within said time, the compensation provided for herein shall be reduced 15%; provided, that knowledge of such injury obtained from any source on the part of such employer, his managing agent, superintendent, foreman or other person in authority, or knowledge of any assertion by the injured sufficient to afford an opportunity to the employer to make an investigation into the facts and to provide medical treatment shall be equivalent to such notice; and no defect or inaccuracy therein shall subject the claimant to such reduction, if there was no intention to mislead or prejudice the employer in making his defense, and the employer was not, in fact, so misled or prejudiced thereby. If no notice of the accident and injury is given to the employer within one year from the date of the accident, the right to compensation shall be wholly barred. If no claim for compensation is filed with the industrial commission within three years from the date of the accident or the date of the last payment of compensation, the right to compensation shall be wholly barred; provided, however, that the filing of a report or notice of accident or injury with the industrial commission, the employer or its insurance carrier, together with the payment of any compensation benefit or the furnishing of medical treatment by the employer or an insurance carrier, shall toll the period for filing such claim until the employer or its carrier notifies the industrial commission and employee, in writing, of its denial of liability or further liability, as the case may be, for the industrial accident or injury, with instructions upon said notification of denial to the employee to contact the industrial commission for further advice or assistance to preserve or protect the employee's rights; and provided further, that the said claim for compensation in any event must be filed within 8 years from the date of the accident.

R568-1-9 Guidelines for Utilization of Medical Panel.

Pursuant to Section 35-1-77, U.C.A., the commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where:

1. One or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

(a) Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,

(b) Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days, and/or

(c) Medical expenses in controversy amounting to more than $2,000.

B. A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report. Where there is a proffer of new written conflicting medical evidence, the Administrative Law Judge may, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification.

C. The Administrative Law Judge may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report addressing these medical issues in all cases where:

1. The treating physician has failed or refused to give an impairment rating,

2. The employer or doctor considers the claim to be non-industrial, and/or

3. A substantial injustice may occur without such further evaluation.

D. Any expenses of the study and report of a medical panel or medical consultant and of their appearance at the hearing, as well as any expenses for further medical examination or evaluation, as directed by the Administrative Law Judge, shall be paid out of the Employers' Reinsurance Fund.

INDUSTRIAL COMMISSION OF UTAH

Case Nos. 88000837 & 90001060

CLARENCE W. DENNY, *	**SUMMARY OF TESTIMONY**
*	**FINDINGS OF FACT**
Applicant, *	
*	**CONCLUSION OF LAW**
vs. *	
*	**AND ORDER**
BEAVER CREEK COAL and/or *	
CIGNA INSURANCE and/or, *	
EMPLOYERS' REINSURANCE FUND, *	
*	
Defendants. *	
*	
* * * * * * * * * * * * * * * * *	

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah on December 4, 1990, at 1:00 o'clock p.m. Said hearing pursuant to Order and Notice of the Commission.

BEFORE: The Honorable Donald L. George, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Virginius Dabney, Attorney at Law.

The defendant employer, Beaver Creek Coal Company and its insurer, Cigna Insurance were represented by Robert J. Shaughnessy, Attorney.

The Employers' Reinsurance Fund was represented by its administrator, Erie V. Boorman, Attorney.

An Application for Hearing requesting medical expenses, temporary total disability, permanent partial disability, travel expenses, interest and attorney's fees was filed with the Industrial Commission of Utah on September 26, 1988, wherein the applicant, Clarence W. Denny, alleges that he sustained an injury by accident arising out of or in the course of his employment with the defendant employer, Beaver Creek Coal Company, on March 6, 1987. That application was assigned case number 88000837, a copy was sent to the defendant employer and an Answer thereto was timely filed. However, by letter dated October 31, 1988, the Industrial Commission advised applicant's counsel that no medical evidence or Employer's First Report of Injury had been received to substantiate the allegations made the in application for hearing, and therefore no hearing would be scheduled until that documentation had been received. By letter dated December 5, 1988, the Industrial

Commission again requested the supporting documentation, and advised that if it was not received within 30 days, the matter would be dismissed. No documentation or medical records being received, an Order of Dismissal without prejudice was entered on January 26, 1989. Further, at this hearing, applicant's counsel stated that there was not a 1987 industrial accident.

A document entitled "Amended" Application for Hearing requesting medical expenses, temporary total compensation, temporary partial compensation, permanent partial compensation, permanent total compensation, travel expenses, reimbursement of paid expenses, interest, attorney's fees, rehabilitation benefits, and untimely E-1 filing/mailing was filed with the Industrial Commission of Utah on May 22, 1990, wherein the applicant alleges that he sustained an injury by accident arising out of or in the course of his employment with the defendant employer in Mar/Apr, 1983, some 4 years prior to the date alleged in the first case, 88000837. This "Amended" Application was assigned case number 90001060, a copy was sent to the defendant employer/insurer, an Answer thereto was timely filed and accordingly, this matter was scheduled for hearing before the Industrial Commission of Utah on December 4, 1990.

It is undisputed that the applicant's date of birth is September 16, 1935, and his social security number is 528-52-6788; that at the time of the alleged industrial accident of March/April, 1983, the applicant was married, had no dependent children, and was earning sufficient to entitle him to the maximum in workers compensation benefits.

The defendant employer's Motion to Dismiss the 1983 accident was taken under advisement.

The issues to be resolved by the Administrative Law Judge, as described by Applicant's counsel were:

1. The 1, 3 and 6 year statutes of limitations raised by the defendant employer.

2. If an industrial accident is found, the applicant's entitlement to permanent and total disability considering his 45% whole person impairments, all or a majority of which the applicant attributes to this alleged industrial accident, combined with the applicant's already having been awarded social security disability compensation, and his age, education and work history, he is a candidate for permanent and total disability.

The defendant employer and insurer did not dispute that the

applicant was probably totally disabled, but attributed all to pre-existing conditions, and none to this alleged industrial accident.

The Employers' Reinsurance Fund also questioned whether this alleged industrial accident had any connection with the applicant's likely permanent total disability given the distant filing of the claim.

A single exhibit was marked as Plaintiff's #1, consisting of a 219 page compilation of medical and other documentation, which was received without objection, although the Employers' Reinsurance Fund reserved the right to object after it had reviewed those records.

It was then stipulated by all parties that the applicant was permanently and totally disabled.

On direct examination, the applicant stated that he had gone to work for the defendant employer as a general laborer approximately 1 year before this alleged industrial accident. On the date of the accident, on or about March or April, 1983 the applicant was engaged in watering the roadways on the belt lines with a tractor pulling an 1,100 gallon water tank, accompanied by co-worker, Matt Breniman. The applicant stated that he had to back in to water the lower belt area because there was nowhere to turn around. As he backed the trailer over the fault line, the tilt and rush of water to the rear of the trailer pulled the tractor back down and under the belt line. The applicant stated that he remembered his hat being knocked off, he thought, by the lower roller which also pushed him down and pinned his body between his legs. He then stated that Breniman came up and asked him if he was alright and helped him out. After some other general information about the tractor and the belt, the applicant then stated that he crawled out himself and stood up without any help. The applicant then stated that his back hurt, but not so that he couldn't walk. He stated that his left shoulder had some scratches on it that hurt worse than anything. He described his backache as extending from his head to his belt line. The applicant thinks that Breniman jumped off the tractor when it was hauled down backwards. Immediately after the accident those 2 were discussing it when Mr. Alger, the belt boss, walked up and all 3 talked about it. The 3 men then proceeded to walk out to the office to fill out a report, and the applicant stated that Dan James was also there. The applicant stated that John Alger filled out the report and he (the applicant) signed it. The applicant stated that he did not know what happened to the report from there on. It was the end of the applicant's shift for that day. The applicant returned to work the next day, and continued to work from there on. He stated that he was sore only. Then he began to get a pain down his left neck,

shoulder and arm, first noticed about 6 months later. However, since the applicant stated that he had been told that he could take a lot of pain, he didn't do anything about it until 2 or 3 years later. At that time, about the winter of 1986, he went to a Dr. Jackson in Provo who referred him to Dr. Kirkpatrick who did a neck fusion on March 12, 1987. After the operation, the applicant was off till July, 1987, returned to work until October 28, 1987, when Dr. Kirkpatrick performed a 2nd neck operation. The applicant then had a lower back operation in January, 1988, again by Dr. Kirkpatrick.

On cross-examination by the defendant employer/insurer, the applicant admitted that he was not sure of the date of this occurrence and it could have been as early as 1982. During the 3 1/2 years before the applicant went to Dr. Jackson, he had no medical treatment and only took Anacin occasionally. He lost no time from work on account of his back, although he may have for other reasons. Two or three months before he went to see Dr. Jackson, his complaint was that he had pain in his neck that radiated into his shoulder, down his arm and his hands tingled. The applicant indicated that the pain got worse when he moved his neck. He also stated that it would come and go. The applicant denied having had any pains in his back prior to this industrial accident, although he admitted that he had regular backaches.

The defendant employer's counsel then read this excerpt from Dr. Kirkpatrick's letter of April 28, 1989 (page 24 of A-1): "as you well know, Mr. Denny is a 54 year old right handed coal miner from Wellington, whom I have treated for the past several years because of progressively severe cervical and lumbar spondylosis causing neck pain, back pain, and dysfunction of all four limbs. His symptoms apparently started back in 1982 when he was involved in a severe mining accident. He has had some degree of neck pain going back even longer than that or for 12 years.

The applicant said that there must have been some misunderstanding between he and the doctor. When asked to explain the reference to 12 years prior to 1982, the applicant at first stated that he could not, and then denied ever having said that to Dr. Kirkpatrick. The applicant stated that the main source of his pain in 1987 was his neck, presently it was a toss up between his cervical and lumbar areas, sometimes one and sometimes the other. The applicant acknowledged having had a conversation with Dr. Kirkpatrick about his having a progressive, degenerative, disease that extended from his tailbone to his neck. The applicant also acknowledged Dr. Kirkpatrick's pragmatic recommendation that he quit working, take medication and live with the symptoms.

Defendant employer's counsel then turned to Dr. Kirkpatrick's letter of February 27, 1989, and quoted, "I would estimate that his

[the applicant's] disability is at least partially related to his industrial injury of March 6, 1987, although some of his symptoms and problems certainly predate this event". The applicant at first stated that he didn't know how that date got in there, then offered that he had run into a screen on that date, which he stated he told his supervisor about, but it was not reported. He then stated that this was another example of a misunderstanding on dates between he and Dr. Kirkpatrick. He then stated that any reference by Dr. Kirkpatrick to an incident in March of 1987 was simply incorrect. The applicant recited that he first saw Dr. Kirkpatrick in December, 1986. Dr. Kirkpatrick's letter of March 11, 1987, (A-1, page 43) was correct, said the applicant, except for the doctor's statement about the applicant having neck pain for about 12 years previous, and the doctor's other statement that this industrial accident occurred 3 years previous, the applicant contending it was 4 years. The applicant admitted that the had a rock drop on his left shoulder sometime previous to this employ, but stated that it was a fractured shoulder blade and didn't involve his neck. This reportedly occurred while he was working at the Soldier Creek Mine.

The applicant did not remember mentioning any prior rock incident in connection with his application for social security disability benefits.

As to heart problems, the applicant said that there was a suspicion of such but it was ultimately determined that there was not a problem. The applicant further stated that he sees a doctor about once a year, either Dr. Morgan or Dr. Gaufin. The purpose in seeing these doctors is because he is always in pain for which he does not take any pain medication, but he does take 2 muscles relaxers and 2 arthritis pills daily.

The applicant stated that other than on the day of occurrence, the next time the accident was mentioned was at a safety meeting held the next day or within one week, at which Alder was present, and thereafter the applicant did not mention the incident to anyone at the mine for the next 3 or 4 years. When the applicant had his first surgery in 1987, he took sick leave, and his health carrier, AETNA paid for that surgery. AETNA also paid for his second surgery but he guessed he was unemployed at that time. The applicant returned to work for the company between July, 1987, and October, 1987, at which point he said a personnel manager, Jack Casper told him not to come back to work. The applicant did not receive a blue slip, and did not file an unemployment claim. The applicant took short term disability under the company policy for a period of 13 weeks, then went on long term disability at $1400 per month until the social security disability kicked in, at $904

monthly, at which time the long term disability was reduced to $510 per month. This line of questioning was allowed for credibility purposes on defense counsel's contention that the company from the onset of surgery on, had simply treated the matter as one of disability rather than the result of an industrial accident, otherwise the applicant would not have been entitled to either the short or the long term disability benefits. On cross-examination by the Employers' Reinsurance Fund, the applicant stated that he had never told his family physician (of 25 years) Dr. Morgan, of any back problems until the 1987 surgery. The applicant also stated that he never went to the Castleview Hospital before that first operation. The applicant did not know who it was that referred him to Dr. Jackson.

On re-direct, the applicant was referred to his statement on page 177 of A-1 to Social Security concerning the accident, and then to the broad question of whether there was any other incident that he could think of that would have caused his problem, he responded in the negative.

On re-cross, there was discussion again of the incident where the rock fell on the applicant's back which was prior to this industrial accident. In a letter dated November 7, 1990, from Dr. Gaufin to Dr. Max Morgan, the applicant disclaimed ever having told Dr. Gaufin about the rock incident, and surmised that it must have come from Dr. Kirkpatrick's records.

On re-direct again, the applicant stated that the rock incident occurred while he was working at the Soldier Creek Mine, that he suffered a hairline fracture of his left shoulder blade, and was off for 6 weeks. The applicant now recalled the incident as having occurred in 1976, that x-rays were taken, no surgery was performed but he did have to wear a sling. He further stated that the pain in his neck and back from the 1983 industrial accident was not the same as that caused by the rock falling on his shoulder blade. On re-cross examination by the Employers' Reinsurance Fund, the applicant stated that he was paid his wages during the 6 weeks that he was off, but did not know whether it came from the workers compensation or from the company. He also stated that his medical bills were taken care of and that he had been to the doctor on several occasions in connection with that. When questioned as to why he had not gone to a doctor for 3 1/2 years after the 1983 industrial incident, the applicant volunteered that the prior employer had sent him to the doctor on the 1976 incident. The applicant also admitted that he had not taken any time off work in connection with the 1983 incident. When questioned as to why he had not related to Drs. Kirkpatrick or Gaufin that his shoulder

bothered him from time to time, the applicant responded with, "why should I tell them that if it wasn't bothering me?". When confronted with the doctor's remarks that his shoulder did bother him, and were therefore likely accurate reports of what he had told them, the applicant again contended that what he had told them must have gotten mixed up. The applicant also admitted that although he had backaches previously, his back had never really started to hurt him until after the second operation. Despite that, in retrospect, the applicant feels that the 1983 incident had something to do with his back problems.

In response to the ALJ's question of whether the applicant had any industrial injuries subsequent to the 1983 incident, the applicant stated, "no". Regarding an office note of Dr. Kirkpatrick dated August 8, 1988, regarding a new injury, the applicant stated that it was when he had told the doctor about running into a screen in the mine, which he did not report to the employer. The applicant denied any other back injuries prior to these 3, but when questioned about a report stating that he had fallen on an anchor, the applicant stated that it was a piloneal cyst on his tailbone, which he acknowledge occurred while he was in the service.

On further re-direct by the Employers' Reinsurance Fund when questioned about having back pain about 6 months before the first operation, the applicant responded that his first pain was 6 months or a year after the industrial accident but was on and off, until just a couple of months before he went to Dr. Jackson when the pain got worse.

On further re-cross by the employer, Dr. Jackson's note of February 27, 1987, indicated that the applicant had left shoulder and neck pain, which the applicant admitted. Dr. Jackson referred the applicant to Dr. Kirkpatrick. The applicant was also referred to Dr. Call for arthritis.

On further re-direct as to the 1987 screen incident, the applicant characterized it as "minor" because he simply knocked his hat off on a piece of screen when he got out of the truck. He said that he mentioned it to the mine foreman, but no report was made. As to the anchor incident, the applicant stated that occurred in 1952.

The applicant called as his second witness, Matthew Breniman. The defendant's Motion to strike witness's Breniman's written statement was granted. Breniman stated that he had lived in Price since 1981, and had worked for Beaver Creek Mine as a utility miner

for 5 years and one month. Breniman stated that he was with the applicant on the date of the alleged industrial accident, but was knocked off the vehicle by a cable holding up the structure. He was not injured so no report was filed. Breniman does not remember what the date of the accident was. He further stated that the applicant was pinned over the steering wheel by a cable over the mid-section of his back, [emphasis added]. Breniman stated that the applicant half way slid out and had to crawl down the fender to get off the tractor. Breniman stated that Alger came by and because of Alger and Breniman's supervisory job responsibilities, all three of them went out to fill out the report. In the mine office, with the applicant, Breniman and Dan James, the General Mine Foreman present, Breniman said he observed Alger fill out the report.

On cross-examination by the employer, Breniman stated that on or about February 8, 1990, after having had no discussions with the applicant since the alleged industrial accident some 7 years before, the applicant contacted him and asked if he [Breniman] would write a statement about the accident. Breniman stated that he did not remember the date of the industrial accident other than it was before the 1984 Wilberg Mine fire. Breniman stated that he came up with the date himself and also the details that he wrote in his letter. Breniman again testified that the applicant was pressed up against the steering wheel by something from behind.

On cross-examination by the Employers' Reinsurance Fund, Breniman testified that they walked to the mine office, and Breniman may have suggested to the applicant that he go to the doctor. Breniman stated that he may have worked with the applicant occasionally thereafter. Breniman stated that he was laid off along with about 40 others as a reduction of force in March, 1986. Breniman stated that he, the applicant, and John Alger, all walked approximately 3,000 feet to the mine office.

Applicant's counsel moved to have Mr. Breniman's written statement re-admitted into evidence since defense counsel had questioned him relative to the statements therein, and that Motion was granted.

Applicant's 3rd witness was John Alger. Alger was born in Price, and had lived there for all but a couple of years, working mostly in the mines. He worked for Beaver Creek from 1980 or 1981 through May, 1989. Alger was made aware of the industrial accident when he came on the vehicles, but no one was around them. Then he ran into the applicant and Breniman. When asked about how the accident occurred, Alger stated that he didn't spend a lot of time on that, but rather concentrated on the applicant, looking for

injuries. Alger assumed he suggested an accident report be filled out because he was the belt foreman. Alger testified that the report was done in the main office with the applicant and Breniman there. Alger stated the general policy was that he would have filled out the form, as per questions put to and answered by an injured party. And then the applicant would sign the report. Alger also stated the general policy was that he would have any witnesses sign that form [but neither the applicant, Breniman or Alger stated that witness Breniman or James signed the form]. When asked what he did with the report, Alger described a tray that reports were put in to go to the main office at Price.

Alger stated, positively, that he held a special safety meeting lasting over 30 minutes, the next day to analyze the accident for preventative purposes. Alger did not recall whether there were any other supervisory personnel at that meeting, but was sure that he would have had to get permission from a higher authority to have such a meeting, which would have been either Dan Meters, or Dan James, because it involved taking 10 to 12 miners off the job for a half hour or more.

Alger then stated that early in 1990, after the applicant had contacted him, Alger called the mine safety secretary, Kathy Robb, and asked her for a copy of that report. Alger stated that he had no response for two or three months, and upon calling her again, she said there was no report.

On cross-examination of witness Alger by the defendant employer, Alger stated that as belt boss his chain of command ran to Dan Jones who was acting Mine Foreman, and then to the Mine Superintendent, although he could access directly to the Mine Superintendent. Alger stated that he could not remember the exact date, ie., '82 or '83 or '84, although he testified about other details previously. Nor did Alger remember what date, or even the approximate month he signed the affidavit for the applicant. Alger testified that the applicant had called him about six months before the affidavit date trying to get information. Alger very strongly stated that despite the company's inability to find anything concerning this accident, he had written the report of this accident, made further notes in recording it as a subject of the emergency safety meeting held the day after the accident, as well as in two later safety meeting reports and other records.

On cross-examination of Alger by defendant Employers' Reinsurance Fund, when questioned if it were not true that safety meetings were held not only in the case of accidents involving injury, but also when there were "near-misses", and that the witness did not know of any injuries to the applicant, Alger

responded that he [Alger] felt the applicant had some. When pressed as to whether he knew if the applicant had any injuries, Alger testified that he was sure he suggested to the applicant that he go to the hospital. He acknowledged, however, that the applicant did not go to the hospital, did not go to a doctor, nor did he miss any time for three years. Despite his earlier stated dual concerns about accidents as a Foreman and for safety reasons, Alger twice denied understanding that an incident of a "near-miss" variety which involved no first-aid, no doctor, and no time lost for 3 years was an "incident report" generated for the company's personnel and other internal uses to try to prevent other such accidents occurring with injury or fatal results, rather than an "industrial injury" report.

Continuing on the Employers' Reinsurance Fund cross-examination, Alger stated that when he came on the accident scene, he spent some time looking around for a body, then headed for a telephone to see if anyone else had any information and that was when he ran into the applicant and Breniman. Alger said the three of them discussed the matter, telephone calls were made to the outside to alert them that there was a possible injured person, and that if they (the applicant, Breniman, and Alger) didn't show up that maybe they were down there with a possible injured person. Alger testified that the 3 of them then walked out some 3,000 feet which was level in part and "rolly-poley" in part, which latter Alger volunteered was one of the reasons they walked out.

The applicant's case in chief was concluded. The defendant employer requested leave to file affidavits from company officials as to what their records might reveal. On the basis that was to be accomplished within 30 days, it was granted. Applicant's counsel then represented that over the month prior to the hearing, as good a search as possible was made and no record was found other than that generated relative to the March, 1987 date of injury, which the applicant stated at the beginning was not correct, and there had been no accident in 1987.

Applicant's counsel then requested opportunity to respond to the defendant employer's affidavit, at which point the defendant employer's counsel represented the substance of the affidavit would be that all existing records of the Beaver Creek Coal Company both in Utah and Denver, were diligently searched and no record exists of the 1983 incident. The defendant employer objected to the written statements by Alger and Henry Smith, who did not testify. The Administrative Law Judge took that Motion under advisement.

RULINGS ON MOTIONS, AND DISCUSSIONS:

At the end of the hearing, the defendant employer objected to and moved to strike the written statement by John Alger. Since Alger testified directly and was available for cross-examination, that Motion to strike the written statement is granted.

The defendant employer also objected and moved to strike the written statement by Henry Smith, who was not present for testimony and cross-examination. The Administrative Law Judge in reviewing the Affidavit, observes that Smith was not a witness to the alleged accident, or any of the other matters testified to at the hearing, and his statement that he pulled damaged vehicles out is redundant of a fact not at issue, that there was a vehicular accident. Further, Smith's "Affidavit" was simply a letter without benefit of notarization, and not even having Smith's address or telephone number where he could be contacted for independent verification. That Motion to strike is also granted.

There are some interesting convolutions in this case.

The applicant testified as to having no pains in his back previous to this alleged industrial accident, but did admit "regular" backaches.

The first application recited an injury date of March 6, 1987, was rightly dismissed for lack of supporting documentation on January 26, 1989. The clear statement on behalf of the applicant at the hearing that there was not a 1987 industrial accident further supports the appropriateness of that dismissal. The second application filed on May 22, 1990, and styled as an "Amended" Application, was not an amendment, but rather simply a new application. Interestingly, there <u>are</u> several references in the medical records to the applicant hitting his head on a screen. Later in the hearing the applicant stated that he had run into a screen in 1987. Also, even though the applicant stated at one point in the hearing that he did not report the screen injury in 1987 to his employer, he later recited that he mentioned it to the mine foreman, but no report was made. Since there is <u>another</u> alleged incident of non-reporting by the employer, credibility is clearly an issue.

When the applicant was questioned about a report that he had fallen on an anchor fluke in the service, the applicant's response was that it was a pilonidal cyst on his tailbone, (which was removed at age 21 (pg 44) in 1953), even though the medical records state that he hurt his lower back.

There is also the accident in question of March/April 1983, and on cross-examination, the applicant admitted that a rock dropped on his left shoulder previous to his employ with this defendant but stated that it was a fractured shoulder blade and didn't involve his neck. This occurred about 1976 while he was employed by Shoulder Creek Mine. There is mention of that in the historical medical records, i.e. Dr. Kirkpatrick's statement in 1987 about the applicant having back problems for 12 years prior would coincide approximately with the applicant's date of 1976. There are no Industrial Commission records in the file as to that 1976 incident even though the applicant said that his prior employer sent him to the doctor on several occasions, that he was off for 6 weeks, was paid and his medical bills were taken care of.

There are other interesting medical notes such as p. 23.1 Dr. Kirkpatrick notes progressive spondylolysis in lower back and neck - L5-S1 severe spondylolysis and spondylolythesis. On p. 23.2 progressive diffused spondylolysis of cervical thoracic and lumbar spine. On p. 25, Dr. Kirkpatrick states, "I consider the patient medically completely disabled because of his progressive spondylitic involving all parts of his spine (the doctor also mentions the applicant's anti-arthritis medication).

The applicant often disagrees with Dr. Kirkpatrick's notes but selectively, i.e., he refutes or attempts to have thrown out those things negative to his case as communication or recording errors, etc., while trying to keep the things that are favorable to his case. He did however, admit that he had a conversation with Dr. Kirkpatrick about his having progressive degenerative disc disease, and on page 31 of Dr. Kirkpatrick notes in February, 1988, the applicant and his wife discussed with the doctor the choices between continued employ versus disability, and it was the applicant's feeling that the company did not want him back.

The applicant said the personnel manager told him not to come back to work, but the applicant did not get a blue slip, nor file an unemployment claim. He did, however, apply for and receive short term disability, then later long term disability, and is still receiving the latter. This is not consistent with his implication that he was terminated.

The ARCO disability application dated 2/9/88 (p. 135 of D-1) recites only C5-6 spondylosis and disc disease with radiculopathy. (There is no mention of an industrial accident which would have sent the applicant applying for workers compensation benefits and foreclosed him from the disability). The applicant also applied for Social Security disability benefits on 2/19/88 and those benefits were ultimately awarded on the basis of the applicant's spondylolisthesis, severe disc disease, stenosis and spondylosis.

Dr. Gaufin's letter of November 7, 1990, p. 22, says, ". . . the patient reported that at that time he developed his problems when a rock fell on his back while in a coal mine and he had intermittent neck pain and pain in his back since that time. Approximately in 1984 he injured his neck when he had caught on a belt line which caused soreness of his neck, shoulders and arms, and the pain would come and go." [no mention of lumbar] Dr. Gaufin notes on p. 222 that the applicant's October 20, 1988, operation was for spondylolythesis. On p. 224, Dr. Gaufin indicates degeneration of the C4-5 disc with accompanying chronic cervical myeloradiculopathy.

The applicant's testimony was that he was pinned with his body down between his legs, which is not consistent with witness Breniman's testimony twice repeated that the applicant was pinned over the steering wheel plus Breniman's written statement to that affect. The applicant extricated himself from the wreckage, and walked out some 3,000 feet over roly-poly surfaces and returned to work the next day.

The applicant did not miss any work, nor go to the doctor for some 3 1/2 years after this alleged industrial accident. The applicant describes 6 months passing before he developed pain in his left neck, shoulder and arm, which interestingly is about the same area as was injured in the Shoulder Creek incident.

Despite the applicant and his witnesses contention that an industrial accident report was filed, there is no Industrial Commission report of such an incident, nor is there any such report in the employer's records. Further, there is no mention of this in any medical records until 1987. There does not appear to be any claim to any other than the applicant's health care provider, not the workmans' compensation carrier, for any of the applicant's surgeries. There is no mention of any back problems to the applicant's 25-year family doctor until 1987.

Likewise the applicant claims twice that the company failed to report his injuries, being the 1983 incident in question, and by his testimony, the 1987 incident, which his counsel later stated never happened.

Witness Breniman, who was RIF'd by the company in 1986 after 5 years, was in the Administrative Law Judge's opinion, groping to prop up the applicant's story. Breniman stated that in his situation, although he was knocked off the vehicle by a cable holding up the structure, since he was not injured, no report was filed. Also, Breniman's version of how the applicant was pinned, as stated above, was clearly different from the applicant's. As to both witnesses Breniman and Alger, it is noted that neither of

these witnesses now work at the mine, apparently as the result of terminations or lay-offs, resulting in an anti-company bias which was clear by observation of their candor and demeanor. This was most evident with witness Alger who was not employed by the mine after May, 1989, was solicited by the applicant concerning this incident, and painted a picture of non-cooperation by the employer for a period of months after the request was made by him for a copy of the alleged report. Alger did not say that an industrial accident report was filed, just a report.; He further stated general policies of how such a form would be filled out and would require witnesses signatures. [No such witnesses' signatures are required.] Interestingly, neither the applicant, Breniman, nor Alger stated that Breniman, who was clearly a witness to the accident signed the form, nor did the applicant, Breniman or Alger state that any other witness at the signing of the form by the applicant, which witnesses would have included Breniman, Alger and Mine Foreman Dan James, signed that report. Alger was clearly antagonistic and evasive.

Having reviewed the file, the extensive exhibits, the testimony of the witnesses, their candor and demeanor, the Administrative Law Judge is now prepared to enter the following:

FINDINGS OF FACT:

1. There was no industrial accident in 1987.

2. The applicant is permanently and totally disabled.

3. Neither the applicant nor his witnesses are credible witnesses.

4. The applicant was involved in an industrial accident which may have occurred in 1983 or 1984, and resulted in vehicle and/or property damage.

5. No Industrial Commission accident report was filled out because of that 1983 - 1984 industrial accident because it did not result in personal injury to the applicant. He was able to walk 3/5 of a mile out of the mine, required no medical attention then nor at any time during the several years after, and then only for his degenerative back disease. The applicant returned to work the next day and never missed any work as a result of this purported injury. Buttressing that is the lack of any injury report within the Company; the payment for medical services by the Company health care provider (probably requiring a co-payment or deductible on the applicant's part) that in a true industrial accident would have been paid for 100% by the industrial carrier; the applicant's

request for Company short and long term disability benefits that would have been precluded if this were an truly an industrial claim; the Social Security Determination as a result of the applicant's degenerative disc disease, and the long standing nature of that disease preceding this alleged industrial accident in the medical records.

CONCLUSIONS OF LAW:

In accordance with the foregoing Findings of Fact, the Administrative Law Judge hereby rules that the applicant has failed to demonstrate by a preponderance of credible evidence that he was involved in a compensable industrial accident in 1983/1984 or 1987 while working for the defendant employer, nor is he permanently and totally disabled as a result of either of those, nor entitled to any workers compensation permanent disability benefits therefrom.

Good cause appearing, the Administrative Law Judge hereby issues the following:

ORDER:

IT IS THEREFORE ORDERED that the applications under case numbers 88000837 and 90001060 alleging industrial accidents of March 6, 1987, and March/April 1983, are hereby denied and dismissed with prejudice.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

INDUSTRIAL COMMISSION OF UTAH

Donald L. George
Administrative Law Judge

Certified this 30th day of March, 1992.

ATTEST:

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of March, 1992, the attached ORDER in the case of was mailed, postage pre-paid to the following persons at the following addresses:

Clarence Denny
c/o Virginius Dabney, Atty
350 E 400 S #202
Salt Lake City UT 84101

Virginius Dabney, Atty
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ERF - UIC

INDUSTRIAL COMMISSION OF UTAH

June A. Stoddard, Paralegal
Adjudication Division

/jas

ORD\Denny

THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY UT 84114-6600

Clarence W. Denny,	*	
	*	
Applicant,	*	DENIAL OF MOTION
vs.	*	FOR REVIEW
	*	
	*	
Beaver Creek Coal and/or	*	
Cigna Insurance and/or	*	Case No. 88000837 &
Employers' Reinsurance Fund,	*	90001060
Respondents.	*	
**********		

The Industrial Commission of Utah reviews the Motion for Review of applicant in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The applicant filed a motion for review of the order of the administrative law judge (ALJ) on April 24, 1992. At that time, he asked for an extension of time until May 11, 1992 in which to file a memorandum in support of his motion. The ALJ granted him until May 17, 1992, and the memorandum was filed on May 26, 1992. The respondents answered the applicant's memorandum on June 5, 1992, and the applicant filed a reply memorandum on July 7, 1992. Since there was no objection by the respondents to the memoranda, we will consider them.

The facts which are alleged by the applicant in his motion for review, and which are concurred in by the respondents are as follows. On or about March or April 1983, the applicant was employed by Beaver Creek Coal Company as a general laborer. At the time, the applicant was driving a trailer, which was pulling a 1,100 gallon water tank, accompanied by a co-worker. The applicant's job on that date was to water the roadways on the belt line to reduce dust. The applicant backed up to the trailer to reach the lower belt line. As he backed over the fault line, the tilt and rush of water to the rear of the trailer pulled the trailer back down and under the belt line.

The applicant testified that his hard hat was knocked off, and he believed that the lower roller of the belt line pushed him down and pinned his body between his legs. His co-worker was knocked off the vehicle by a cable holding up the belt line. The co-worker immediately came and offered assistance to the applicant, who he remembers as being pinned over the steering wheel by a cable stretching over the midsection of his back. The co-worker does not recall the exact date of the accident, but fixed it in the general vicinity of early 1983. He does recall that the applicant crawled out of the trailer himself. The applicant testified that his back hurt immediately from his head to his belt line and his shoulder

was severely scratched.

While the applicant and his co-worker were discussing the accident, John Alger, the belt boss, came upon them, and the three men went to the office to fill out a report, which the applicant signed. The applicant did not know what happened to the report from that point. The accident was discussed at a safety meeting the next day. Mr. Alger testified that he had made a written report of the accident, although one could not now be found in the company records.

The applicant testified that he returned to work the next day, still feeling sore. Within six months, he began to have pain down his left neck, shoulder, and arm, but merely endured it.

In the winter of 1986, the applicant sought medical treatment and was referred to Dr. Kirkpatrick who performed a neck fusion on March 12, 1987. The applicant was off work until July 1987, and returned to work until October 28, 1987 when Dr. Kirkpatrick performed a second neck operation. A lower back operation was completed in January 1988 by Dr. Kirkpatrick.

The applicant's health carrier AETNA paid for the neck surgery. In October 1987, the employer told the applicant not to come back to work. He did not receive a termination notice or file an unemployment claim. He received short term disability for 13 weeks, and then went on long term disability until he began receiving Social Security Disability payments.

There was some evidence that in 1976, the applicant suffered a hairline fracture of his left shoulder blade when a rock fell on him while he was working at the Soldier Creek Mine. The applicant was off work for six months on that occasion, but no surgery was performed. The applicant denied having substantial back pain until the 1983 accident.

The applicant's counsel stated during the hearing in the instant case that there was no 1987 accident as alleged in the original application for hearing, and the ALJ found that there was no 1987 industrial accident. There is thus no discussion of any such accident in the remainder of our opinion.

The ALJ made the following findings:

1. There was no industrial accident in 1987.

2. The applicant is permanently and totally disabled.

3. Neither the applicant nor his witnesses are credible witnesses.

4. The applicant was involved in an industrial accident which may have occurred in 1983 or 1984, and resulted in vehicle and/or property damage.

5. No Industrial Commission accident report was filled out because of that 1983 - 1984 industrial accident because it did not result in personal injury to the applicant. He was able to walk 3/5 of a mile out of the mine, required no medical attention then nor at any time during the several years after, and then only for his degenerative back disease. The applicant returned to work the next day and never missed any work as a result of this purported injury. Buttressing that is the lack of any injury report within the Company; the payment for medical services by the Company health care provider (probably requiring a co-payment or deductible on the applicant's part) that in a true industrial accident would have been paid for 100% by the industrial carrier; the applicant's request for Company short and long term disability benefits that would have been precluded if this were ... truly an industrial claim; the Social Security Determination as a result of the applicant's degenerative disc disease, and the long standing nature of that disease preceding this alleged industrial accident in the medical records.

Summary of Testimony, Findings of Fact, Conclusion of Law and Order dated March 26, 1992.

The applicant argues the following in connection with errors alleged against the ALJ:

1. The workers' compensation act is to be applied liberally in favor of awarding benefits and all doubts as to coverage are to be resolved in favor of the applicant.

2. Credibility of the witnesses in this matter should not affect compensation.

3. The decision and order are not supported with adequate findings and legal conclusions as required by recent case law and therefore are not supported by substantial credible evidence.

4. The ALJ confused the issue of medical causation with statutory reporting requirements.

With regard to the argument that the workers' compensation act is to be applied liberally in favor of awarding benefits, and all doubts as to coverage must be resolved in favor of the applicant, the burden is upon the applicant to establish a prima facie case of accident, injury, and damages to give rise to a liberal construction. We agree that the applicant can receive benefits under the workers' compensation act if an industrial accident is shown, and there is a medical causation connection between an alleged accident and an alleged injury.

The next issue involves that of credibility of the witnesses. The ALJ provides us sufficient rationale for his determination that the applicant and his witnesses were not credible. However, the respondents join with the applicant in alleging that credibility of witnesses does not matter since the respondents had no evidence contrary to the testimony of the applicant and his witnesses. Additionally, the respondents commendably go further and state unequivocally that the applicant and his witnesses were credible. Of course, the applicant has stated his belief in the credibility of his witnesses.

In this case, the ALJ was acting as the fact finder, and credibility was very much an issue since the only evidence as to the occurrence of an accident was through the testimony of witnesses at the hearing. The ALJ did not have to accept the testimony of the witnesses as representing the truth if he had a reasonable basis for finding their testimony as unbelievable or subject to less weight based on such factors as bias, inability to observe the related events, or other motives of the witnesses to misrepresent the facts. Cf. Baker v. Ind. Comm'n, 17 Utah 2d 141, 144-145, 405 P.2d 613 (1965). The ALJ does provide a reasonable rationale for his finding that the witnesses were not credible, and we find no fault with his judgement.

We will, however, treat the respondents' concession that they could find "no lack of credibility in either the [a]pplicant or his supporting witnesses...." as dispositive. The respondents as part of this concession also agreed that "(1) the tanker rolled backwards, (2) the [a]pplicant was pinned in the equipment, (3) [a]pplicant suffered no apparent injury, (4) [a]pplicant attended a safety meeting the day following, (6) a MSHA report was signed by all parties, (7) the [a]pplicant returned to regular work and worked successfully for four years thereafter." Answer to Applicant's Motion for Review, at 3.

When the respondents agree that there was no lack of credibility in either the applicant or his supporting witnesses, there is now no issue as to memory, truthfulness, ability to observe, or bias, among others, and we have only to decide what the testimony proved.

The next allegation of error relates to whether the ALJ provided adequate findings of fact. The Court of Appeals has said that findings which amount to a single conclusory statement that the "applicant's various listed symptoms are not related to her work as a telemarketer at Unicorp" are inadequate. Adams v. Board of Review, 173 Utah Adv. Rep 18 (Ut. App., Nov. 5, 1991). We believe that the ALJ did make adequate findings in this case in regard to legal causation because he extensively discussed the testimony and evidence relating to legal causation, said why it was believable or not believable, and then made the following pertinent specific findings of fact:

1. There was an industrial accident in 1983;

2. There was no personal injury to the applicant from the 1983 accident;

3. There was no industrial accident in 1987;

4. Neither the applicant nor his witnesses are credible; and,

5. The applicant is permanently and totally disabled.

As a conclusion of law, the ALJ, in part, found that the applicant was not permanently and totally disabled as a result of either of the alleged accidents in 1983 or 1987. The ALJ did provide justification for his findings and conclusions, and he explained in detail how the applicant had failed to prove legal causation. The ALJ in Adams, supra, did not resolve factual disputes in order for the Court of Appeals to determine what she had decided. The ALJ in the instant case did determine specifically, among other findings, that no compensable injury had occurred, and he gave plausible reasons for this conclusion. Lancaster v. Gilbert Dev., 736 P.2d 237, 241 (Utah 1987).

There were additional motions in connection with statutes of limitation raised by the respondents which were not ruled upon by the ALJ presumably because of the ALJ's finding of no compensable injury.

The relevant statutes of limitation provided in 1983 in part:

> ...If no notice of the accident and injury is given to the employer within one year from the date of the accident, the right to compensation shall be wholly barred. If no claim for compensation is filed with the industrial commission within three years from the date of the accident or the date of the last payment of compensation, the right to compensation shall be wholly barred.

U.C.A. Section 35-1-99.

Although the parties dispute whether notice was given to the employer within one year from the date of the accident, there is no dispute that no claim for compensation was ever filed with the industrial commission within the three years required by U.C.A. 35-1-99, and the applicant does not deny the respondents' contention that he did not file a claim within the requisite period.

Further, the statute in effect at the time of the purported injury provided:

> ...Whenever an employee sustains an accident arising out of or in the course of his employment, the employee shall file with the Commission, in writing, notice of such accident, with a copy to the employer; if such notice is so filed within three years of the time of the accident or within the time limitations provided in section 35-1-99, the Commission shall obtain jurisdiction to make its award when the injury becomes apparent.

U.C.A. Section 35-1-100.

Again, the evidence shows that no notice was ever given to the Commission concerning the 1984 alleged accident.

The statute relating to permanent total disability is U.C.A. Section 35-1-67. However, it is clear from Mecham v. Ind. Comm'n, 692 P.2d 783, 785-786 (Utah 1984), that in order for the Commission to apply Section 35-1-67, jurisdiction in the Commission must first attach based on another statutory provision. For example, in Mecham the Utah Supreme Court stated, "Section 35-1-99 is designed solely to create jurisdiction in the Industrial Commission, and there is no need for any particular formality, as long as notice is given." Dean Evans Chrysler v. Morse, 692 P.2d 783 (Utah 1984); Utah State Insurance Fund v. Dutson, 646 P.2d 707 (Utah 1982). Once jurisdiction is established, the nature of the claim dictates what statute of limitation applies. Mecham, supra at 785.

The Utah Supreme Court has long recognized that a claim for compensation need not bear any particular formality. Utah Apex Mining Co. v. Ind. Comm'n, 116 Utah 305, 209 P.2d 571 (1949). However, in this case no claim was filed within the requisite period to invoke jurisdiction. Whatever form such claim takes, it must give "notice to the parties and to the commission of the material facts on which the right asserted is to depend and against whom claim is made." Dutson, supra at 709 citing Palle v. Ind. Comm'n, 79 Utah 47, 7 P.2d 284 (1932). Although it is clear that no claim was timely filed, the remaining avenue which must be considered is whether the written notice provisions of U.C.A. Section 35-1-99 were met. If notice was minimally given, then the jurisdiction of the Commission may have been invoked. We will not consider the third avenue which extends filing time from the date of the last payment of compensation since no compensation was ever paid on this alleged injury.

The respondents' agree that the "[a]pplicant signed a report of the event that day..." even though a written report could not be found in the respondent employer's records. The applicant at the time of the accident said that he "hurt all over." This statement should have certainly alerted his employer that at the very least a potentially compensable accident had occurred, and it is reasonable to assume that the employer did make an accident report because its agent, John Alger, says that he did.

The respondents make the statement that "[n]either the applicant nor the [respondents] considered this as industrial since no injury occurred." We can find no support for this statement in the file. However, there was a MSHA report completed after a safety meeting the following day, and we agree that this safety report was not notice within the contemplation of the workers' compensation statutes.

We conclude that a written report concerning the accident was completed on the day of the accident based upon the testimony of the applicant, and John Alger, the company belt boss. However, neither the employer nor the employee filed a report with the Industrial Commission. The failure of the employer to file this report cannot now be used to provide a defense to the employer's failure to file. Mannes-Vale, Inc. v. Vale, 717 P.2d 709 (Utah 1986); Kennecott Corp. v. Ind. Comm'n, 740 P.2d 305 (Ut. App. 1987).

The failure of the employee to file his notice with the Industrial Commission as required by U.C.A. Section 35-1-100 is not essential under Kennecott since the necessary party to receive notice is the employer. Id. at 309. The purpose of the notice

requirement is 1) to enable the employer to provide immediate medical diagnosis and treatment; and 2) to facilitate the earliest possible investigation of the facts surrounding the injury. Id. The respondents admit that the applicant said that Mr. Alger filled out a report and that the applicant signed it on the day of the event. We conclude that based on these admissions the employer had notice.

The applicant did not file a claim of any sort until September 26, 1988 when he filed a claim for injuries allegedly occurring on March 6, 1987. The 1987 date is no longer in contention as a date of injury. The applicant "amended" his application on May 22, 1990 to allege an injury in the March/April 1983 time frame. Assuming that the amendment was effective, the applicant filed his claim some five and one/half years after his injury. This was outside the three year statute of limitations imposed for compensation claims by U.C.A. 35-1-99, and temporary total compensation, temporary partial compensation, and permanent partial compensation requested by the applicant for the 1983 injury must be denied under this statute. There is, however, no bar to medical expense claims under this statute, and the issue of permanent total compensation remains open.

U.C.A. Section 35-1-67 (1953) is the governing statute for permanent total disability compensation. The Utah Supreme Court has held that there is no statute of limitations under the statute in effect on the date of the applicant's alleged injury, and under U.C.A. Section 35-1-78 we have continuing jurisdiction to award permanent total disability compensation once jurisdiction attaches. Mecham, supra, at 785. Since we have held that Industrial Commission jurisdiction has occurred based on notice of injury from the employee to the employer, we must decide whether there was shown to be medical causation.

The medical causation question is more difficult to answer. The ALJ found, the Social Security Administration found, and the respondents have stipulated that the applicant is permanently and totally disabled. With regard to causation, the applicant testified immediately following the accident that "his back hurt from his head to his belt line and his shoulder was severely scratched." He also said that he "returned to work the next day still feeling sore." He claimed that "within six months he began to get pain down his left neck, shoulder and arm, but merely endured it."

The medical records show that the next report of the applicant's medical difficulty is that of Dr. Douglas Kirkpatrick dated March 11, 1987. In a letter to Dr. Richard Jackson, Dr.

Kirkpatrick states:

> "The patient says he first developed neck problems about 12 years ago when a rock fell on his back in a coal mine. He had intermittent neck pain that came and went, and then 3 years ago he injured his neck again when he got caught underneath a belt line. This causes a soreness in his neck and arms. The pain would usually come and go but then about 6 weeks ago it became more frequent and then constant."

Further, Dr. Kirkpatrick stated that his impression was C6-7 disc disease, and spondylosis with left C7 radiculopathy. On March, 1987 the applicant received surgery for C6-7 decompression and fusion with iliac bone graft. Dr. Kirkpatrick, the surgeon, found that the disc was quite degenerated. The post operative findings were confirmed to be the same as his initial impression. Operative Report, March 13, 1987.

After hitting his head on a screen, the applicant returned with a "new neck pain", and because of recurring pain, Dr. Kirkpatrick determined that an MRI scan of the C4 to T1 lower cervical spine was required. The MRI determined that there was marked spinal stenosis at C4-5 with moderate central C4-5 disc herniation. On December 21, 1987, the doctor wrote that the applicant was to be admitted to the hospital on January 6, 1988 for an anterior C5-6 decompression and fusion with an iliac bone graft on January 7, 1988.

On July 1, 1988, Dr. Kirkpatrick stated that the applicant's lumbar spine X-rays showed a significant grade I L5-S1 spondylolisthesis with associated severe disc disease and spondylosis. He also related that there was some disease at L4-5 and L3-4. This finding was confirmed when the applicant was operated upon on October 20, 1988.

It is clear from the medical evidence that the applicant has lower back and cervical problems. The respondents allege that there is "no mention ... made ... of repetitive trauma from heavy work." Answer to Applicant's Motion for Review, at 8. There is a statement from Dr. Kirkpatrick on October 19, 1988 which says that the applicant's past history was "noncontributory to his condition, except for long life of hard labor, which has contributed to both upper and lower spinal disease." History and physical report, Dr. Kirkpatrick, Oct. 19, 1988.

Further, the evidence seems to show that his medical difficulties stemmed, at least in part, from a rock fall in 1976,

from a collision with a screen in 1987, and possibly from the accident in 1983. However, there is insufficient medical evidence which amounts to a preponderance of evidence, and which shows that there was a medical link among these events and the current alleged permanent total disability.

Dr. Kirkpatrick, in a letter to the applicant's attorney, has rated the applicant with a permanent partial impairment of the whole man at "about 20% referable to his neck and about 25% referable to his lumbar spine or about 45% total." The doctor estimated that the applicant's disability "is at least partially related to his industrial injury of March 6, 1987, although some of his symptoms and problems certainly pre-date this event." Of course, the problem with his reference to the 1987 date is that the applicant admitted, and the ALJ determined, that there was no industrial accident on this date.

Our difficulty with this case is that we have insufficient evidence to conclude that the applicant's current medical problems, and permanent total disability are medically caused or aggravated in part by one or more industrial accidents. The medical reports which have been entered into evidence fail to provide us with medical opinion which states this within the realm of reasonable medical probability.

There is no basis on which to refer this case to a medical panel. We have been shown no conflicting medical reports, and the applicant has failed to carry his burden of persuasion. Based on the concession of the respondents and our analysis of the evidence which flowed therefrom, we will substitute our findings and conclusions of law for those of the ALJ.

FINDINGS OF FACT:

1. The applicant and his witnesses were credible based on the concession of the respondents.

2. There was no industrial accident in 1987.

3. There was an industrial accident on or about March 1983.

4. The applicant properly gave notice of the March 1983 industrial accident to John Alger, an agent of Beaver Creek Coal, on the date of the accident.

5. The applicant filed a notice of claim with the Industrial Commission of Utah about the industrial accident of March 1983 by amending his March 6, 1987 claim on May 22, 1990.

6. The employer, Beaver Creek Coal, never filed a notice of the March 1983 accident with the Industrial Commission.

7. The applicant had only minor injuries resulting from the accident on or about March 1983.

8. The evidence was insufficient to show that the applicant's current permanent total disability was related to one or more industrial accidents.

9. There was no evidence that the 1976 rock fall was industrially related.

10. There was no conflicting medical evidence warranting a medical panel.

CONCLUSIONS OF LAW:

The applicant has failed to show by a preponderance of the evidence that his permanent total disability is legally and medical caused by one or more industrial accidents. His failure to file a claim for compensation within the statute of limitations imposed by U.C.A. Section 35-1-99 bars temporary total disability compensation, temporary partial disability compensation, permanent partial disability compensation, or related compensation arising from the 1983 accident.

ORDER:

IT IS ORDERED that the order of the administrative law judge dated March 26, 1992 is affirmed.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a

transcript of the hearing for appeals purposes.

Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Colleen S. Colton
Commissioner

Certified this 10th day of August 1992.
ATTEST:

Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I certify that on August 10, 1992, a copy of the attached Denial of Motion For Review in the case of Clarence W. Denny was mailed to the following persons at the following addresses, postage paid:

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